



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL APPEAL NO. 48 OF 2012

ALEX MAINA WANJOHI.....APPELLANT

Versus

JOSEPH NG'ANG'A GITHU

GITIMU KINARO

MARY GATHONI GITIMURESPONDENTS

(Appeal arising from the judgment of Hon. J. Kiarie Principal Magistrate in Nyeri Civil Case No. 924 of 2004)

JUDGMENT

1. By a plaint dated 11th December 2004 the Appellant ALEX MAINA WANJOHI sued C.K. MURICHU and JOSEPH NG'ANG'A GITHU in respect of an accident on 21st January 2002 along Karatina-Sagana road and by an amended plaint dated 28th December 2004 the Appellant added GITIMU KINARO and a 3rd Defendant and pleaded that the 1st Defendant was the bona fide owner of motor vehicle registration No. KZP 362 while the 2nd Defendant the driver thereof.
2. It was pleaded that on 21st January 20002 the Appellant was lawfully walking along Karatina Sagana Road at Kerugoya junction when the 2nd defendant drove the said motor vehicle so carelessly and negligently that he lost control of the same and knocked down the Appellant and blamed the defendants for the said accident and injuries and special damages.
3. The 2nd and 3rd defendants filed statement of defence in which they attributed the accident herein to the negligence of the Appellant.
4. The Appellant by an application dated 4th February 2010 applied to substitute GITIMU KINARO with MARY GATHONI GITIMU whom he described as his Legal Representative and on 14th June 2010 discontinued the suit against 1st Defendant MR. C.K. MURICHU.
5. Upon these pleadings the matter proceeded for hearing upon which the trial court dissolved the suit against the 3rd Defendants and entered judgment in favour of the Appellant against the 2nd Defendant at 50% with special damages of 600,000/- medical report Kshs. 141,000/- and special damages of Ksh. 278,842/-.
6. Being dissatisfied with the said judgment the appellant filed this appeal and raised the following grounds of appeal.

1. The trial magistrate erred in law and fact in dismissing the appellant's case against the 3rd defendant despite the said defendants own express admission of ownership of motor vehicle registration No. KZP 326.

2. The trial Magistrate erred in appropriating liability in the ratio of 50:50 yet the

defendants did not tender any evidence on how the accident occurred.

- 1.
2. The Appellant prayed that:
 1. ***The judgment of the trial Magistrate on liability be set aside and substituted with an order holding 2nd defendant and 3rd defendant jointly and severally liable at 100%.***
 - 2.
 1. Directions were given that this appeal be determined by way of written submissions which have been filed.
 2. **APPELLANTS SUBMISSIONS**
 3. On behalf of the Appellant it was submitted that the Appellant brought the 3rd defendant through an amended plaint as the bona fide owner of motor vehicle registration No. KZP 362 and that in the amended plaint in place of the 3rd defendant it was pleaded 1st defendant which was mistyped and therefore the trial court erred in dismissing suit against the same.
 4. It was further submitted that the trial court was wrong in entering judgment on the basis of 50%:50% by failing to appreciate the Appellants evidence that the 2nd Defendant hit him on the overtaking lane. He therefore submitted that this court ought to interfere with the judgment on liability but enter the same on general damages, future medical expenses and special damages
 5. **2ND AND 3RD RESPONDENTS SUBMISSIONS**
 6. It was submitted that no evidence was tendered to prove that the 3rd Defendant owned the motor vehicle and that the 1st Defendant was the registered owner of the same. It was submitted that the error on paragraph 3b of the amended plaint should have been amended during the hearing of the primary suit.
 7. It was submitted that the 2nd and 3rd Defendants in their defence denied that they were negligent and that the Appellant was responsible for the said accident and therefore urge the court to enter the judgment on liability.
 8. This being first appeal the court is under duty to reevaluate the evidence tendered before the trial court and to come to its own conclusion on the same suit I hereby do on the issue of liability only.
 9. It was the Appellants case that he alighted at the Karatina- Kerugoya -Sagana junction and had a bag on his shoulders and as he was crossing from Karatina side in the middle of the road he saw a vehicle from the Karatina side and as he came to the end of the road the motor vehicle came to his side and hit him as he cleared the tarmac road and that it looked as the motor vehicle that hit him wanted to overtake the one he had alighted from.
 10. Under cross examination by Mr. Ombongi the Appellant he stated that he passed behind the motor vehicle he had alighted from to cross the road which left the scene as he started to cross the road and that it was as if the motor vehicle that hit him was trying to overtake.
 11. In re-examination he admitted that he was hit on the last fourth lane of the road and that he had not seen the motor vehicle that hit him as he began to cross the road but saw it while on the road crossing.
 12. The 3rd defendant in her evidence in chief stated that Gitimu Kinaro died in the year 2007 on 7th June and that the said motor vehicle was sold in the year 2009 and did not know that she was sued as administratrix of his estate though she confirmed that the 2nd defendant was the driver.
 13. **ISSUES**
 14. From the pleadings herein the evidence and the submissions the following issues are for determination:
 1. ***Did the Appellant prove that the 3rd defendant/respondent were bona fide owner of the motor vehicle registration KZP 362?***
 - 2.

2. Was the trial court right in his finding on liability at 50%:50%?

1. From the evidence tendered before the trial court there is nothing on record to prove that the 3rd Respondent was a bona fide owner of the subject motor vehicle further there was no documentary evidence tendered to prove that she was the administratrix of the estate of GITIMU KINARO save that he was her husband which to my mind did not make her the administratrix of his estate. Her evidence was clear that the deceased owned motor vehicle registration KZP 362 and that she

- knew nothing about the alleged accident neither did she know that she was sued as administratrix.
2. It was upon the appellant to prove to court that she was a bona fide owner of the said motor vehicle or that she was the administratrix of the estate of the registered owner and since there was no such evidence tendered I find no fault with the courts finding that
 3. ***“It is not possible to see how 3rd defendant came in or how the substituted person who came in for the 3rd defendant is enjoined in this suit.”***
 - 4.
 5. I would therefore dismiss this ground of appeal.
 6. On the issue of liability I am guided by the principle set out by CHESON Acting JA (as he then was) in STEPHEN MURINGI & ANOTHER v R (1982-88)1KAR 360 where he said at page 360
 7. ***“Where a right of appeal is confined to question of law only an appellate court has loyalty to accept the finding of fact of the lower court(s) and resist the temptation to treat finding of facts as holding of law or mixed findings of fact and law and it should not interfere with the decision of the trial court or first appellate court unless it is apparent that on the evidence no reasonable tribunal could have reached that conclusion which would be the same as holding the decision is bad in law.”***
 - 8.
 9. Further in PETER V SUNDAY POST LTD [1958]EA 424 the court had this to say:
 10. ***“Whilst an appellant court has jurisdiction to review the evidence to determine whether the conclusion of the trial judge should stand, this jurisdiction is exercised with caution, if there is no evidence to support a particular conclusion or it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proceed or has plainly gone wrong the appellate court will not hesitate so to decide.***
 - 11.
 12. I have analysed the evidence tendered herein above on how the accident occurred against the trial courts finding that ***“the plaintiff has not explained why he holds 2nd defendant liable other than that he hit him when on the road. He does not explain why he crossed road at that time and where the 2nd defendants motor vehicle was when he started to cross”*** and find the same is supported by the Appellant's evidence both in chief and under cross examination.
 13. I would therefore not interfere with the trial courts finding on facts noting that the appellant has not placed any material before the court to enable me do so and therefore this ground of appeal also fails.
 14. I therefore find that the appeal herein lacks merit and therefore confirm the judgment of the trial court and dismiss the appeal herein with cost to the Respondent.
 15. Dated, signed and delivered at Nyeri this 20th day of February 2014.

J. WAKIAGA

JUDGE

1. Court: Judgment read in open court in the presence of Mr. Kimunya but in the absence of Mr. Kiama.

J. WAKIAGA

JUDGE

20/2/2014